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BRIEF FOR APPELLEE

Supreme Court of the United States

No. 707

October Term, 1945

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, APPELLANT,

versus

L. GEORGE BENJAMIN, as Insurance Commissioner of the State of South Carolina

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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L. GEORGE BENJAMIN, as Insurance Commissioner of the State of South Carolina

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

STATEMENT

The Prudential Insurance Company sued in the South Carolina Supreme Court to enjoin the collection of the premium license tax levied against foreign insurance companies by Section 7948-7949 of the South Carolina Code of 1942 upon the allegation that this tax contravened the Commerce Clause of the Constitution.[1]

That Court denied relief, 35 S. E. (2d) 586.[2] Upon appeal to this Court a motion to dismiss was filed and probable jurisdiction was noted on January 28, 1946 (R. 47).

[1] The position that the statute violated the Fourteenth Amendment has been abandoned. (R. 9, 27, 40-43). *Lincoln National Insurance Co. v. Read*, 89 L. ed. 1250.

[2] Decisions of other Courts on similar state laws since *U. S. v. Southeastern*, 322 U. S. 533, are in accord with the South Carolina decision. *In re: Insurance Tax Cases*, 160 Kan. 300, 161 P. (2d) 726; *State v. Prudential Ins. Co.* (Ind.), 64 N. E. (2d) 150.

SUMMARY OF ARGUMENT

South Carolina's tax is levied on foreign corporations for the privilege of doing business within the state. It is measured by a percentage of the premiums collected in the state from South Carolina residents paid on policy contracts made therein and governed by its laws.

Since the state may prohibit a foreign corporation from doing intrastate business within the state, it may impose conditions. The payment of this tax is an appropriate condition.

The state statute does not discriminate against interstate commerce merely because it classifies **foreign** insurance companies for the tax and exempts **domestic** companies. That classification is appropriate because of the benefits received by the State from the domestic corporations. In any event it is one which the State may make without contravening the Commerce Clause or the Fourteenth Amendment.

An examination of the decision in *U. S. v. Southeastern Underwriters*, 322 U. S. 533, shows that it is confined to the holding that Congress intended the insurance business to be subject to the Sherman Act and that since much of this business was conducted in interstate commerce it was appropriate for Congress to legislate with reference thereto. The decision does not withdraw from South Carolina the power to lay its premium tax.

Any question as to the intent or effect of the *Southeastern* decision is settled by the McCarran-Ferguson Act in favor of the continued state taxation and regulation of those features of insurance activities heretofore regulated and taxed.

ARGUMENT

I.

THE TAX LEVIED BY SOUTH CAROLINA ON THE PREMIUMS COLLECTED ON SOUTH CAROLINA BUSINESS BY THE PRUDENTIAL DOES NOT REGULATE INTERSTATE COMMERCE.

(Assignments of Error 2, 3, 8 and 10.)

The Prudential has twenty-one agents engaged in selling insurance contracts in the State of South Carolina. These agents operate out of four district offices located in the state. Applications for insurance are solicited in South Carolina from South Carolina residents by these agents. If the agent is successful in obtaining an application, medical examinations and investigations of prospective risks are made in the state by local physicians and local investigators employed by the Prudential. (R. 3, 5.)

These applications with the supporting papers are forwarded by one of the district offices from South Carolina to Prudential's Home Office in New Jersey. If the application is approved the insurance contract is prepared and signed by the appropriate officers. It is then forwarded to one of the South Carolina district offices and delivered by an agent of the Prudential in South Carolina to the South Carolina applicant in exchange for the initial premium. (R. 3.)

The contract between the Prudential and the applicant becomes effective with the delivery of this policy in South Carolina. *Paul v. Virginia*, 8 Wall. 168, 183; *Hartford Fire Ins. Co. v. Wilson*, 187 U. S. 467.

These insurance contracts are South Carolina contracts subject to the laws of that State. *Pink v. A. A. A. Hwy. Express*, 314 U. S. 201; *Mutual Life Ins. Co. v. Hill*, 193 U. S.

551; *New York Life Ins. Co. v. Dodge*, 246 U. S., 357; *Supreme Lodge, K. of P., v. Meyer*, 198 U. S. 508; *Aetna Life Ins. Co. v. Dunkin*, 266 U. S. 389; *Owens v. Bankers Life Ins. Co.* 84 S. C. 253, 66 S. E. 290; *Cantey v. Phila. Life Ins. Co.*, 166 S. C. 181, 164 S. E. 609.

Not only is this established by the decisions of this Court and the Courts of South Carolina but it is also the statute law of South Carolina. *Code of 1942*, § 7773. (Appellee's Brief, App. A.) The Prudential Insurance Company by doing business in South Carolina has consented to this statute and does not question its validity here.

The South Carolina premium tax statutes (Appellant's Brief, App. 61-64) levy a tax on foreign insurance companies doing business in the state for the privilege of doing that business measured by a graded license fee in an amount equal to three per centum "on the total premiums, *i. e.*, total premium income or total premium receipts from the State, less any dividend or bonuses paid in cash or applied in abatement of premiums of such company as collected from citizens of or residents of this state during the time the company has done business in this State since making last such return". *Code of 1942, Sections 7948-49.*

In practice, premiums on South Carolina policies are paid by the South Carolina resident to one of the district offices in the state on premium notices mailed to the policyholder by one of these district offices. On receipt of payment the district office issues the appropriate premium receipt. (Appellant's Brief, 18.)

If the tax event be considered as the consummation of the policy contract between the Prudential and the South Carolina resident, the facts as alleged show that this event occurs in South Carolina and that the contract is controlled by South Carolina law. If the tax event is considered as the

payment of the periodic premium on this South Carolina contract, this payment is an event which occurs within the state. If the tax event be considered the granting of Prudential's request to do intrastate business in South Carolina and the annual renewal of that grant, it occurred in South Carolina.

That the policy contract is prepared in New Jersey, receives the signature of the Prudential officers there, is sent through the mails to the company's agent in South Carolina, and that the premium monies after receipt at the Prudential district offices in South Carolina are forwarded to the home office in New Jersey, are matters immaterial to the issues. The activity which measures the South Carolina tax is an aggregate of a number of local transactions. From *Polish National Alliance v. N. L. R. B.*, 322 U. S. 643, 649:

> "Such was the context in which this Court decided again and again that the making of a contract of insurance is not interstate commerce and that, since the business **is in effect merely a congeries of contracts,** the States may, **for taxing** and divers other purposes, **regulate the making of such contracts** and the insurance business **free from the limitations imposed upon state action by the Commerce Clause.**" (Emphasis supplied.)

The decision in *United States v. Southeastern Underwriters Assoc.*, 322 U. S. 533, 546-7, is not to the contrary:

> "We may grant that a contract of insurance, considered as a thing apart from negotiations and execution, does not itself constitute interstate commerce."

In so far as its underwriting business is concerned, the Prudential Insurance Company is engaged in the intrastate activity of making policy contracts and collecting premiums on these policies in many of the states of the Union. It is true that money, documents and correspondence in considerable quantity pass between its home office and its

agents in the various states. It is also true that a company of the vast resources of the Prudential cannot invest its funds without those investments having an effect on interstate commerce. Nevertheless the company's primary business is that of writing policies insuring the lives of individuals. The making of these policy contracts and the collection of premiums on them are local matters transacted within the confines of a single state. That the company makes a large number of these contracts and has an immense premium income does not alter this fact.

Since the Prudential may not do an intrastate business in South Carolina without the permission of the State, South Carolina may impose on it for the privilege of doing business a privilege tax more onerous that it imposes on domestic corporations. *Lincoln National Ins. Co. v. Real*, 89 L. Ed. 1250. The fact that the Prudential is engaged in interstate activities does not alter South Carolina's right to impose this tax for the privilege of doing intrastate business. *International Shoe Co. v. Shartel*, 279 U. S. 429, 433; *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 258.

The *Southeastern* decision recognizes this principle:

> "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities, which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the state." (322 U. S. 548.)

The Commerce Clause itself does not limit South Carolina's right to tax this intrastate activity. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33. It is

true that if Congress has enacted laws which regulate intrastate affairs because of their effect on interstate commerce (*Wickard v. Filburn*, 317 U. S. 111; *N. L. R. B. v. Jones & L. Steel Corp.*, 301 U. S. 1; *N. L. R. B. v. Fainblatt*, 306 U. S. 601) the state law is superseded to the extent of actual conflict. An examination of the Acts of Congress shows that, with the exception of the McCarran-Ferguson Act, there is no statute dealing with the regulation of insurance companies as such. Congress has elected to regulate labor relations of all businesses where these relations affect interstate commerce, and were we discussing a South Carolina labor statute it would be necessary for the Court to decide whether that statute was in conflict with the National Labor Relations Act or the Fair Labor Standards Act. It is also true that, but for the McCarran-Ferguson Act, there might be a conflict between some state statute and the federal laws relating to trusts, monopolies and unfair trade practices (The Sherman Act, 26 Stat. 209; The Clayton Act, 38 Stat. 730; The Robinson-Patman Anti-discrimination Act, 49 Stat. 1526; Federal Trade Commission Act, 52 Stat. 111). Since none of this Congressional legislation is in conflict with the South Carolina premium tax statutes, it has no relevancy here.

II.

THE SOUTH CAROLINA PREMIUM TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

(Assignments of Error 1, 3, 8, 9 and 10.)

The burden of the Prudential's argument is that the foreign insurance corporation must pay three per cent of its premium income on South Carolina business to the State while the domestic insurance companies do not pay this tax

or bear any equivalent burden (R. 6). It claims that this classification discriminates against interstate commerce.

South Carolina classifies for taxation the **foreign** insurance company and exempts from this tax the **domestic** insurance company. It does not classify for taxation **interstate** commerce and exempt **intrastate** commerce. (Cf. *New York v. Roberts*, 171 U. S. 658; *Bethlehem Motors Corp v. Flynt*, 256 U. S. 421.)

Many of the domestic insurance companies do business outside of South Carolina (R. 10). Assuming that these South Carolina companies which operate in other states do their business along the lines of the Prudential (R. 3, 5) and assuming that this business is interstate commerce, then these domestic companies would be required to pay the South Carolina premium tax if the Prudential's contention that it is a tax on interstate commerce is sound. Such is not its purpose or effect. The domestic company is exempt be-

The cases cited by appellant (Brief 24-27) are readily distinguished from the facts here. Those cases seem to fall into these classes: (1) Statutes which prohibit the entry of goods into a state, except under onerous conditions: *Welton v. Missouri*, 91 U. S. 275, where the license tax was upon persons who sold within the state goods not manufactured or produced therein; *Hale v. Bimco Trading Co.*, 306 U. S. 375, where the statute imposed a 15c per cwt. inspection fee upon foreign cement and no fee upon cement produced in the state; *Scott v. Donald*, 165 U. S. 58, where the statute prohibited the importing of liquor except by the State Dispensary Commission; (2) Statutes laying a direct burden upon the channels of interstate commerce: *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, where the statute laid an occupation tax upon the business of loading and unloading vessels engaged in interstate commerce; *Sprout v. South Bend*, 277 U. S. 163, where a city ordinance imposed a license tax upon busses engaged in interstate operations; *Crutcher v. Kentucky*, 141 U. S. 47, where the statute required the licensing of agents of express companies engaged in interstate commerce; (3) The "drummer" cases: *Robbins v. The Taxing District*, 120 U. S. 489, *Best & Co. v. Maxwell*, 311 U. S. 454, where the statute imposed a fixed sum license tax upon the business of displaying goods by sample within the state for direct shipment to customers in interstate commerce; and (4) Statutes which tax gross revenues derived from interstate commerce: *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650.

In state statutes stricken down as discriminatory there must be a discrimination against interstate commerce itself; it must accomplish a substantial distinction and a real injury. *Gregg Dyeing Co. v. Query*, 286 U. S. 472. The South Carolina premium tax does not come within the reasoning of the above decisions.

cause it has a South Carolina charter, not because it operates in intrastate commerce.

Were the Prudential to surrender its New Jersey charter and incorporate under the laws of South Carolina but otherwise operate its business as outlined in its petition, it would be exempt from this premium tax because it would be a **domestic** corporation. If, on the other hand, it retained its New Jersey charter but moved its principal office to South Carolina, discontinued its sale of policies and collection of premiums in all other states and confined its investments to South Carolina, it would still be liable for this tax for it would still be a **foreign** corporation.

The tax, therefore, can only be construed as a tax on foreign corporations for the privilege of doing an intrastate business in South Carolina. The State has the power to levy this tax, even though domestic insurance companies are exempt. *Lincoln National Ins. Co. v. Read*, 89 L. Ed. 1250, 1252. This Court has held that even though a corporation is legally in a state for the doing of interstate business, the State can, because it is **a foreign corporation,** require it to obtain the consent of the State and pay a fee for the doing therein of intrastate business. *Railway Express Co. v. Virginia*, 282 U. S. 440; *Atlantic Refining Co. v. Virginia*, 302 U. S. 22.

The State Supreme Court held that the Prudential had failed to show that the classification made by the State of foreign insurance companies as covered and domestic insurance companies as exempt actually discriminated against the foreign insurance company, because the comparisons of the petition failed to take into consideration property taxes paid by the resident companies. (R. 22, 10.)

The return does not admit discrimination but points out the economic advantage to South Carolina of the investments of reserves by the domestic companies in South

Carolina industry and securities. The Prudential drains off many hundreds of thousands of dollars from the state for investment elsewhere. (R. 14, 15.) Cf. Appellant's Brief, 21.

An examination of Section 7948 shows the importance which South Carolina attaches to this investment of insurance reserves in South Carolina securities and industries. If the Prudential were to invest the reserves on South Carolina business in South Carolina, it would obtain a reduction of one-third of this premium tax. In reaching a conclusion as to whether there is an actual discrimination against the foreign corporation it is appropriate for this Court to consider not only the property taxes paid by the domestic companies, but also the economic advantages in having those companies invest their reserves in the State and subject to the supervision of the State.

For thirty-five years the Prudential Insurance Company has paid this license tax to South Carolina without protest. (R. 5, 8.) Its own petition characterizes this tax as "lawfully assessed" prior to 1945. (R. 8.) There has been no change in this South Carolina statute in recent years. Pertinent here are the remarks of the Court in the *Southeastern case* (322 U. S. 549):

> "And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."

The prosperity of the Prudential, the growth of its business within and without South Carolina (R. 3-5) over a long period of time, is proof that this statute and similar legislation in other states has imposed no undue burden upon the appellant. The argument that some states have

modified their insurance regulatory and tax structures since the decision of *United States v. Southeastern, supra,* has no relevancy. (Appellant's Brief 57.) We are concerned solely with the question of whether the South Carolina premium tax contravenes the Commerce Clause.

III.

THE DECISION IN UNITED STATES V. SOUTHEASTERN UNDERWRITERS, 322 U. S. 533, DOES NOT INVALIDATE THE SOUTH CAROLINA PREMIUM TAX.

(Assignment of Error 1.)

Since the Prudential after paying the South Carolina premium tax for thirty-five years without protest justifies its challenge of that statute upon the ground that the *Southeastern* decision invalidates state legislation of this type, its holding should be examined.

The Southeastern Underwriters Association and 200 member stock fire insurance companies were charged with violating the Sherman Act by conspiring to restrain interstate commerce in maintaining noncompetitive premium rates in six states and by monopolizing trade in fire insurance in and among the same states. The District Court sustained a demurrer to the indictment.

The only two questions considered by this Court were: "(1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which restrains and monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which stretch across state lines constitute 'Commerce among the several States' so as to make them subject to regulation by Congress under the Commerce Clause?" 322 U. S. 538.

The Court held: (1) that the word "commerce" in the Constitution included a business such as insurance, that much of the activity of insurance companies, including that alleged in the indictment, was conducted across state lines and therefore subject to regulation by Congress; (2) that the intent of the Sherman Act was to treat insurance as any other trade, and if, as charged, the defendants conspired to restrain and monopolize interstate commerce there was a violation of that statute.

The dissenting opinions agree that the insurance business is subject to Congressional power under the Commerce Clause but find that the Congress did not intend the Sherman Act to apply.

The opinion of the Court carefully points out that for seventy-five years it had held in actions questioning state legislation that the "Commerce Clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies." 322 U. S. 533, 534.

The Court recognizes that the same legal formulæ devised to uphold state power may not be used to strike down Congressional power under the Commerce Clause.

It recognizes that the insurance contract itself is not interstate commerce but that certain aspects of the insurance business conducted across state lines do constitute interstate commerce. Many activities of a business may be intrastate and therefore subject to state control and taxation while other activities of the same business are interstate and subject to Federal regulation. In such a situation the practical test is whether the competing demands of state and nation may be met. In deciding whether they may the Court will in the absence of Federal regulation accept as persuasive the long period of state taxation and regulation. 322 U. S. 547-549.

While the holding of the Court is inconsistent with *dicta* in some of the cases (*Paul v. Virginia*, 8 Wall. 168, 183; *Hooper v. California*, 155 U. S. 648, 655), we do not understand it to overrule those decisions holding these state statutes valid. 322 U. S. 543. For example, we believe that the state statute in *Paul v. Virginia* would be sustained today.

The opinion concludes with an answer to the position that it invalidates state legislation:

> "The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. *Cf. Parker v. Brown*, 317 U. S. 341, 350-352, 87 L. ed., 315, 325-327, 63 S. Ct., 307. No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices."

In stressing the effect on state laws relating to rates and boycotts the Court inferentially holds that other state legislation is unaffected. This is in accord with our position. Until Congress says that the premium tax on South Carolina business has such an effect on interstate commerce as to place it in conflict with a Federal statute, that tax is a lawful fee for the privilege of doing business within the state.

"Thus, federal regulation does not preclude state taxation and state taxation does not preclude federal regulation". *Polish National Alliance v. N. L. R. B.*, 322 U. S. 643, 649.[4]

[4] *Polish National Alliance v. N. L. R. B.*, 322 U. S. 643, was under consideration by the Court at the same time as was the *Southeastern* case, 322 U. S. 538, 563, 580, 587, 653.

IV.

THE RIGHT OF THE STATE TO REGULATE AND TAX THE BUSINESS OF INSURANCE IS PROTECTED BY THE McCARRAN-FERGUSON ACT.

(Assignments of Error 4, 5, 6 and 7.)

By Public Law No. 15, 79th Congress, 15 U. S. C. 1011-1015, commonly known as the McCarran-Ferguson Act, (Appellee's Brief, App. B) Congress sought to put an end to the suggestion that the *Southeastern Underwriters* decision had destroyed the regulations and tax statutes of the various states relating to insurance. (Appellee's Brief, App. C.)

Since under our view the rights of the states to regulate and tax purely intrastate aspects of the insurance business is clear without Congressional action, it is unnecessary to define with particularity the several provisions of this Act. However, the point might be briefly made that even were this state taxation an encroachment upon the National Government's right to regulate interstate commerce, the passage of the McCarran-Ferguson Act saves it from invalidity.

In the line of cases which followed *Cooley v. Port Wardens*, 12 How. 299, a distinction has been made between those aspects of interstate commerce which require national uniformity of regulation and those local in nature which do not. *Southern Pacific v. Arizona*, 89 L. Ed. 1469, 1474. In the former field the failure of Congress to regulate has been held to constitute a presumption that Congress intended that there be no regulation by the states, while in the latter field the states were free to regulate until Congress had acted affirmatively. (Cf. Appellant's Brief 44.)

In the McCarran-Ferguson Act Congress has legislated in both of these fields. As to those aspects of the insurance business requiring uniform national regulation it has rebutted the presumption by saying that its silence is not to be construed as prohibiting state regulation. As to those aspects of the insurance business which comprise matters local in nature the Congress has given specific permission to the states to continue as heretofore in regulation and taxation.

The Sherman Act, the Clayton Act, the Federal Trade Commission Act and the Robinson-Patman Antidiscrimination Act are federal statutes pertaining to matters national in character heretofore regarded as requiring uniformity of application. As to them, Congress provided (with exception of those features of the Sherman Act dealing with boycott, coercion and intimidation) that they are not to apply to the insurance business until January 1, 1948, and then only to "the extent that such business is not regulated by State law"—thus saying that its failure to make the mentioned Acts apply to the insurance business at the present time is not to be construed as prohibiting state regulation in these fields.

As to those aspects of the insurance business which the states had previously been regulating and taxing as local matters, the Congress provided that they "shall be subject to the laws of the several states which relate to the regulation and taxation of such business." Continued state regulation is affirmatively provided. The extent of the state regulation intended by Congress is established by the Act and by its legislative history as the extent to which the states had regulated the local aspects of the insurance business under the law as it had been interpreted prior to the *Southeastern Underwriters* decision.

Senator McCarran, one of the sponsors of the Bill, made this clear when he stated in the Senate (Cong. Rec., Vol. 91, 1470):

> "It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case."

Similarly in the formal report of the House Committee on the Judiciary (House Report No. 143, February 13, 1945, Appellee's Brief, App. C.) this purpose is manifested:

> "Your Committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective states. * * *
>
> "The Committee has therefore given immediate consideration to S. 340, together with a similar measure, H. R. 1973, so that the several states may know that the Congress desires to protect the continued regulation and taxation of the business of insurance by the several states, and thus enables insurance companies to comply with State laws. * * *
>
> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we **should provide for the continued regulation and taxation of insurance by States, subject,** always, however, **to the limitations set out in the controlling decisions** of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U. S. 346), and *Conn. Genl. Ins. Co. v. Johnson* (303 U. S. 77), which hold, inter alia,

that a State does not have power to tax contracts of insurance or re-insurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way." (Emphasis supplied.)

An examination of the *Allgeyer, Cotton Compress Co.* and *Johnson* cases will show that the decisions there protected individuals and corporations from state laws violating the provisions of the Fourteenth Amendment.

The extent of the State's power to regulate and tax prior to the *Southeastern Underwritgrs* decision is found in the *Polish National Alliance* case:

> "Such was the context in which this court decided again and again that the making of a contract of insurance is not interstate commerce and that, since the business of insurance is in effect merely a congeries of contracts, **the states may, for taxing** and divers other purposes, **regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the Commerce Clause.** (Emphasis supplied.)

And in *U. S. v. Southeastern Underwriters:*

> "For seventy-five years this Court has held, whenever the question has been presented, that **the Commerce Clause** of the Constitution **does not deprive the individual state of power to regulate and tax specific activities of foreign insurance companies** which sell policies within their territories." (Emphasis supplied.)

To our basic contention that the states have the right to regulate and tax intrastate aspects of the insurance business there is added the further position that the legislative body of the National Government has properly given its permission to the states to continue such regulation and taxation, even though the intrastate field in which the states

are operating might also lie within the legislative reach of Congress.

The grant of such permission by Congress has long been an acknowledged power of that body. "Congress has undoubted power to redefine the distribution of power over interstate commerce", and may "permit the states to regulate the commerce in a manner which would otherwise not be permissible." *Southern Pacific v. State of Arizona*, 89 L. Ed., 1469, 1474. Cf. *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, and *International Shoe Co. v. Washington*, 90 L. Ed. 109.

CONCLUSION

For these reasons we submit that the judgment of the South Carolina Supreme Court should be affirmed or the appeal dismissed.

Respectfully submitted,

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APPENDIX

APPENDIX A.

§7773. **Condition precedent to doing business in this State.**—It shall be a further condition precedent to the right of any such corporation to do business in this State, that it shall be taken and deemed to be the fact irrebutable, and part and parcel of all contracts entered between such corporation and a citizen or corporation of this State, that the taking or receiving, from any citizen or corporation of this State, of any charge, fee, payment, toll, impost, premium or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this State, and that the place of the making and of performance of such contract shall be deemed and held to be within this State, anything contained in such contract or any rules or by-laws of such corporation to the contrary notwithstanding.

1942 S. C. Code, §7773.

APPENDIX B.

McCarran-Ferguson Act

Chapter 20—Public Law 15

(S. 340)

An Act to express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by insurance to the extent that such business is not regulated by State law.

SEC. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Stand-

ards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

Approved March 9, 1945.

15 U. S. C., Sections 1011-1015.

APPENDIX C.

House Committee on the Judiciary

House Report No. 143, February 13, 1945

The Committee on the Judiciary, to whom was referred the bill (S. 340) to express the intent of the Congress with reference to the regulation of the business of insurance, having considered the same, report favorably thereon with an amendment with the recommendation that the bill, as amended, do pass.

GENERAL STATEMENT

From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several States. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years, leading to the generally accepted doctrine that the business of insurance was not subject to Federal law.

On June 5, 1944, in the case of *U. S. v. Southeastern Underwriters Association et al.*, the Supreme Court decided

that the business of insurance was commerce and, therefore, subject to the Sherman Act of July 2, 1890, as amended, and the Clayton Act of October 15, 1914, as amended.

The Attorney General, in several appearances before the Judiciary Committee, frankly stated that the Department of Justice had no opposition to an extension of time to the insurance industry in order to make necessary adjustments to this decision.

Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case*, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.

Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case*, will subject insurance executives to both civil and criminal actions for misappropriation of company funds.

The committee has therefore given immediate consideration to S. 340, together with a similar measure, H. R. 1973, so that the several States may know that the Congress desires to protect the continued regulation and taxation

of the business of insurance by the several States, and thus enables insurance companies to comply with State laws. What is more, the Congress proposes by this bill to secure adequate regulation and control of the insurance business.

Nothing in this bill is to be so construed as indicating it to be the intent or desire of Congress to require or encourage the several States to enact legislation that would make it compulsory for any insurance company to become a member of rating bureaus or charge uniform rates. It is the opinion of Congress that competitive rates on a sound financial basis are in the public interest.

It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U. S. 346) and *Connecticut General Insurance Co. v. Johnson* (303 U. S. 77), which hold, *inter alia*, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.

PURPOSE OF THE BILL

The purpose of the bill is two-fold: (1) to declare that the continued regulation and taxation by the several States

of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts for approximately two sessions of the State legislatures, so that the States and the Congress may consider legislation during that period. It should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts. It should be noted further that no moratorium is granted from the Sherman Act relative to agreements or acts of boycott, coercion, or intimidation.

* * * * *

U. S. Code, Congressional Service, 1945, No. 2, pages 214-16.

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